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S. 744 – The Border Security, Economic Opportunity, and Immigration Modernization Act

Noteworthy

Floor Situation: On Tuesday June 11, 2013, the Senate voted, 84-15, to proceed to S. 744. This legislation is expected to remain on the floor through the month of June.

Background: S. 744 was introduced on April 16, 2013, and the Senate Judiciary Committee held three days of hearings on this bill. The bill reported by a vote of 13-5 (Senators Hatch, Graham, Flake voted in favor; Senators Grassley, Sessions, Cornyn, Lee, and Cruz voted against) on May 21, 2013, after five days of committee mark-up, and after approximately 165 amendments were debated, 91 of which were adopted.

The Senate Judiciary Committee report on this legislation is available here. This Legislative Notice is based on committee-reported bill and highlights the provisions of the four titles that are expected to receive attention during the Senate debate of S.744.

Executive Summary: S. 744 is an omnibus bill designed to address the estimated 11.5 million illegal aliens living and working in the United States. This legislation attempts to address all facets of immigration, including: border security and immigration enforcement; legalization procedures for illegal aliens; employment verification; and revising nonimmigrant visa programs.

Title I of S.744 contains provisions designed to secure the Southern Border of the United States, including additional resources for border states to prevent migration and prosecute cases.

Title II establishes the general legalization requirements for aliens seeking registered provisional immigrant status as well as for special pathway categories – for agricultural workers to aliens who are eligible under the Development, Relief, and Education for Alien Minors Act (DREAM). The processes for naturalization are also laid out in this title. The bill also contains provision giving the Secretary of the Department of Homeland Security discretion to waive many of these

requirements. This title also contains provisions for a new nonimmigrant work visa program administered by the Department of Agriculture in consultation with the Department of Labor.

Title III sets forth the regime for interior enforcement, including workplace enforcement by mandating the E-verify system, modifying immigration-related criminal laws, providing additional resources for immigration courts and broadening the discretion of immigration court judges.

Title IV allows for increases to employment-based nonimmigrant visas, increases investigative authority for the Department of Labor, increases protections against fraud in the hiring of foreign workers and creates a new guest worker program.

Bill Provisions

Short Title

The four titles of this bill are preceded by a short title section that lays out important processes for legalization. This section preconditions the legalization of illegal aliens on the implementation of certain border security enforcement requirements.

Section 3 allows for the Secretary of the DHS to commence processing applications for registered provisional immigrant (RPI) status after the following two triggers are met:

- **Section 5** of the bill requires the Department of Homeland Security to submit to Congress, within 180 days of enactment, a "Comprehensive Southern Border Security Strategy," including plans to accomplish "effective control," which is defined by Section 3. DHS would be required to implement this strategy immediately after its submission. Congress will receive semiannual reports on the implementation of this plan and the Comptroller General will review the information in these reports annually.
- **Section 5** also requires DHS to establish, within 180 days of enactment, a Southern Border Fencing Strategy, the purpose of which is to identify where fencing, infrastructure, and technology should be deployed to secure the Southern border.

Commenting on these provisions, the Congressional Research Services has noted, "based on the interplay between the triggers in Section 3 and other provisions of the bill, it appears that aliens likely could begin applying for RPI status within a year of the bill's enactment."

For people with legal status via an RPI conferral, Section 3 states that the Secretary may not adjust their status to lawful permanent resident (LPR) until:

- The Comprehensive Southern Border Security Strategy is substantially deployed and operational;
- The Southern Border Fencing Strategy has been implemented and substantially completed;

- The mandatory employment verification system is operational; and
- An electronic exit system to collect machine readable data is being used at air and sea ports of entry.

Section 3 also provides exceptions to these restrictions if:

- 10 years have elapsed since enactment;
- The conditions have not been met because of litigation before the Supreme Court, or a ruling from that court holding that the implementation requirements of this bill are unconstitutional;
- A force majeure has prevented implementation of one of the triggers.

If one of the above conditions happens, the Secretary may permit a person with RPI status to apply for LPR status.

In addition, these triggers do not apply to:

- Agricultural workers who can receive legal status under Section 2211, or "Blue Card" provision, of the bill; and,
- Aliens who entered the United States as children, under Section 2103 of the bill.

Section 3 permits the Secretary to waive environmental and other review requirements, subject to limited judicial review, that may delay the Southern Border Security Strategy.

Section 4 of the bill creates a Southern Border Security Commission if, after five years from enactment, the effective control of high-risk border sectors has not been achieved. The Commission is solely empowered to make recommendations to the President, the Secretary and Congress, which are then reviewed by the Comptroller General. This section also explains the function and composition of the Commission.

In addition to the triggers of Section 5 set forth above, it requires the Secretary to consult with other government agency heads to minimize the impact of the fencing on the environment or the culture of local communities. It further states that the Secretary is not required to install fencing or infrastructure if it is determined that such resources are not needed.

Section 6 creates a Comprehensive Immigration Reform Trust Fund, with initial appropriated funding of $8.3 billion from the Treasury's general fund, to help meet the trigger requirements. This section identifies where the funds shall be made available and provides for the deposit of certain immigrant- and nonimmigrant-related fees into the trust fund account.

Title I – Border Security

Sections 1102 to 1109 of this title expand certain border enforcement programs and authorize border security-related funding, including:

- Requiring U.S. Customs and Border Protection to hire an additional 3,500 officers for ports of entry by the end of fiscal year 2017;
- Authorizing the National Guard to assist border security efforts;
- Creating eight new district court judgeships in border states and making two temporary judgeships permanent;
- Appropriating funds for Operation Stonegarden and increasing prosecutorial capacity in the Tucson sector of the border;
- Requiring DHS to establish a two-year grant program to provide satellite telephones for Southwest border residents at risk of border violence due to lack of cellular service.

Section 1111 requires DHS and DOJ to issue policies, within six months of enactment, regarding the use of force by DHS that requires: a report for each use of force; procedures for investigating complaints of use of force; and how the department will review such incidents, including how to discipline.

Section 1112 requires that all CBP, Border Patrol, and ICE agents, as well as agriculture specialists within 100 miles of the border, receive appropriate training on such things as:

- Detecting fraudulent travel documents;
- Individual rights;
- The scope of enforcement authority;
- The use of force policies;
- Immigration laws;
- Social and cultural sensitivity toward border communities;
- The impact of border operations on communities;
- Environmental concerns

Section 1113 creates a DHS Security Border Oversight Task Force responsible for recommending immigration and border enforcement policies, strategies, and programs. DHS is obligated to respond within 180 days explaining how the findings will be addressed. Within two years of its first meeting, the task force must submit a final report regarding its findings.

Section 1115 creates new Protection of Family Values in Apprehension Program where border "migration deterrence programs" are required provide due consideration for repatriation and deportation decision where an apprehended person has responsibility for, or is traveling with, a child or has humanitarian concerns with repatriation. This section requires training for officers making such decisions so that they will consider the best interest of the child and family unity, among other things, in the decision-making process.

Section 1121 creates requirements that DHS certify, within one year after enactment, that it has only deported aliens through entry/exit points during daylight hours. There are certain exceptions to the deportation requirement, including when there is a compelling government interest justifying the non-daylight deportation, the manner of deportation is in accordance with an agreement with Mexico, or the alien consents.

Title II – Immigrant Visas

Section 2101 establishes registered provisional immigrant (RPI) status, whereby the DHS Secretary is able to confer legal status to aliens who apply and pay any fees or applicable penalties and assessed taxes. Aliens seeking this status must establish by the preponderance of evidence that they have maintained physical presence in the United States beginning December 31, 2011, unless their absences are "brief, casual, and innocent." Aliens have a one year period to apply, although that period may be extended to 18 months by the Secretary.

This section contains certain factors that make an alien ineligible for RPI status, including convictions for:

- A felony;
- An aggravated felony under Section 101(a)(43) of the Immigration and Naturalization Act;
- Three or more misdemeanor offenses, if convicted on different dates. This provision is subject to waiver by the Secretary for humanitarian purposes, to ensure family unity, or if doing so is in the public interest.

This section also allows the Secretary to designate a spouse or child as an RPI if their physical presence was maintained since December 31, 2012, and they meet the eligibility requirements.

Under this section, aliens with pending applications for RPI status or with a conferred RPI status may not be detained or removed, unless ineligible or the RPI status has been revoked.

For aliens in removal proceedings who are eligible for RPI status, this section allows them to apply for that status. Under this section, removal proceedings may be terminated.

Under this section, employers may continue to employ an alien during the pendency of an RPI application.

RPI status is conferred for an initial period of six years and may be extended if the alien remains eligible and meets the requirements for extension, including:

- Maintaining employment requirements;
- Demonstrating that he or she is unlikely to be a public charge or demonstrate average income not less than 100 percent of the federal poverty level throughout the period of admission;
- Satisfying any applicable federal tax liability;
- Paying an additional $500 penalty fee.

Aliens who have been granted a deferred action under the Deferred Action for Childhood Arrivals (DACA), pursuant to the Secretary's memorandum of June 15, 2012, may be eligible for RPI status.

Under this section, aliens who receive RPI status are not eligible for any federal means-tested benefits and are considered as a noncitizen for the purposes of certain other federal benefits, though they may be issued a Social Security number.

Section 2102 lays out the extensive requirements for adjusting an alien's status from RPI to LPR. This section also sets forth the waiting period for the ultimate application for naturalization.

Section 2103 deals with the implementation of the DREAM Act. Under this section, the Secretary has discretion to adjust the status of RPI immigrants to that of LPR after five years, if it can be demonstrated that the alien:

- Was younger than 16 years of age on the date on which the alien initially entered the United States;
- Earned a high school diploma or GED in the United States; and
- Acquired a degree from an institution of higher education, completed at least two years of a bachelor's degree, or served in the Armed Services for at least 4 years.

The Secretary has authority under Section 2103 to waive higher education requirements for an alien who demonstrates compelling circumstances. This section lays out additional requirements.

Section 2104 specifies that the Secretary may consider the information provided by the alien seeking RPI status, extension or adjustment in considering any immigration application from the alien, but may not otherwise disclose the information other than certain required disclosures. This section provides protections for employers in relation to the use of employment records submitted in connection with an application for RPI status, extension or adjustment.

Section 2104 also authorizes the Secretary to establish an administrative appeal process within DHS and allows for a single appeal for each administrative decision. An alien may be granted a stay of removal and would not be considered unlawfully present during the appeals process. If an alien's application is denied or is revoked, the alien may seek review before the United States District Court with jurisdiction. An alien may also seek review in a Court of Appeals in conjunction with the judicial review of an order of removal, deportation, or exclusion if the validity of the denial has not been upheld in a prior judicial proceeding.

Section 2106 permits the Secretary to establish, within U.S. Citizenship and Immigration Services, a program to award grants to nonprofit organizations that assist eligible applicants for RPI status, including those providing information on eligibility for the benefits of RPI status. The organizations may also give assistance for those trying to adjust their RPI status to LPR status.

Section 2211 sets the "Blue Card" status requirements for immigrant agricultural workers. This section affords aliens who work in agricultural employment areas, and who will make additional commitment to agricultural employment, to have a legal status similar to the RPI status. In order to qualify, an alien must have:

- Performed agricultural employment in the United States for at least 575 hours or 100 days during the two-year period ending on December 31, 2012;
- Worked at least 150 days of agricultural employment during each of three years, for the five-year period beginning on the date of enactment;
- Worked during the eight-year period beginning on the date of enactment;

This program ends eight years after enactment. Aliens who have completed the necessary agricultural employment requirement may apply to adjust status from a "Blue Card" status to lawful permanent resident.

Section 2212 sets forth the adjustment to LPR status for agricultural workers under the Blue Card program who have fulfilled their future work requirements. They must also demonstrate that they have paid all tax assessments, comply with the same criminal eligibility requirements used for determining RPI status, and pay a $400 fine to be eligible to apply for LPR status. Spouses and minor children of Blue Card workers residing in the U.S. are eligible for derivative Blue Card and LPR status.

Sections 2231 and **2232** create new W-3 (for contract workers) and W-4 (for at-will workers) nonimmigrant visas for agricultural workers. W-3 and W-4 visas would be capped at 112,333 visas per year during the program's first five years, with provisions for the Secretary of Agriculture, in consultation with the Secretary of Labor, to adjust these caps and to set visa limits for subsequent years based on specified and other appropriate factors. W-3 and W-4 workers would not be allowed to bring their spouses and children with them to the United States as dependents. This section sets forth the specific factors the Secretary of Agriculture, in consultation with the Secretary of Labor, must consider in adjusting the visa cap. The visa term is for three years.

Sections 2301 and **2302** created two separate tracks for merit-based systems for immigrant visas. Track one is designed as a point system to admit aliens based on their employment skills, while track two is designed to expedite the admission of certain people in the existing visa backlog.

Section 2305 changes the family-based immigration system by reclassifying spouses and minor Children of LPRs as "immediate relatives." This allows for the automatic conversion to immediate relative designation for pending petitions filed on behalf of a spouse or child of a lawful permanent resident. The caps, based on the worldwide family-sponsored level, are as follows:

- 20 percent for unmarried sons or daughters of U.S. citizens;
- 20 percent for unmarried sons or daughters of LPRs;
- 40 percent for brothers and sisters of U.S. citizens.

Section 2307 also reallocates family preference visas, beginning 18 months after enactment, allocated as follows:

- U.S. citizens' unmarried sons or daughters would not exceed 35 percent of the worldwide level;

- U.S. citizens' married sons or daughters 31 years of age or younger would not exceed 25 percent of the worldwide level;
- LPRs' unmarried sons and daughters would not exceed 40 percent of the worldwide level.

Section 2312 allows for previously excluded, deported, removed, or departed voluntarily, aliens to apply for parole into the United States. The Secretary shall exercise discretion in determining those aliens who do not qualify as an immediate relative because of the death of a citizen or resident who might have. This section allows for the adjudication of an immigrant visa application as if the death had not occurred for a widow or orphan of a qualifying relative who died before the completion of the immigrant visa processing.

Section 2314 gives immigration judges more discretion to decline removal, deportation, or exclusion proceedings if the judge determines that such action:

- Is against the public interest;
- Would result in hardship to the alien's U.S. citizen or permanent resident parent, spouse, or child.

An immigration judge also has discretion to decline these proceedings if it is evident that the alien eligible for naturalization. Under this section, the waiver is not available in certain criminal and national security-related removal proceedings. The Secretary also has discretion to waive grounds of inadmissibility under this section.

Section 2315 strikes the "extreme" from the hardship provisions under the waivers of inadmissibility for the three and 10 year bars for aliens who have been illegally present in the United States, if they are parents of U.S. citizens or LPRs.

Title III – Interior Enforcement

Section 3101 amends the employment verification and worksite enforcement provisions of the Immigration and Naturalization Act and imposes new requirements to be phased in over time that all employers use an electronic eligibility verification system (EVS) similar to E-Verify. It also strengthens the law's compliance provisions, among other changes.

Section 3105 is designed to prevent discrimination in the employment verification process. This section amends the current anti-discrimination provisions in the INA to insure that employers cannot verify employment eligibility in a discriminatory manner or use it in an unlawful manner.

This section subjects prohibited uses of the EVS for unfair immigration-related employment practices to civil penalties through the DOJ Office of Special Counsel. The jurisdiction of this office is expanded to cover certain small employers. Section 3105 also would require the Equal Employment Opportunity Commission to refer all allegations of immigration-related unfair employment practices to the DOJ Special Counsel and would more than double the monetary penalties for violations of worker rights under these provisions.

Section 3201 expands U visa eligibility for victims of serious labor violations, where a worker suffered physical or mental abuse or is victim of criminal activity and the victim assists the investigation or prosecution. This section lays out covered criminal violations that would qualify the victim for the new U visa category.

Section 3301appropriates $1 billion to set up the new employment verification system.

Section 3303 requires a mandatory exit system to be implemented by DHS. All databases that process information on aliens shall be integrated and provided to ICE, CBP, USCIS, DOJ, and the Department of State. Machine-readable passports, visas, and other travel documents shall be mandatory no later than December 31, 2015. The section further requires that biometric exit data systems be used at the 10 highest-volume airports in the United States. It also requires that, no later than six years from the date of enactment, biometric systems be implemented at 30 international airports in the United States.

Section 3305 prohibits federal law enforcement officers from using race or ethnicity to any degree when making routine or spontaneous law enforcement decisions, such as ordinary traffic stops. Officers may consider race and ethnicity when conducting specific investigations "only to the extent that there is trustworthy information, relevant to the locality or time frame, that links persons of a particular race or ethnicity to an identified criminal incident, scheme or organization."

Section 3701 renders inadmissible and deportable any alien convicted of an offense for which an element was active participation in a street gang (as defined in 18 USC 512(a)). Also renders inadmissible and deportable any alien whom DHS determines has since the age of 18 knowingly and willingly participated in a criminal street gang. This section allows the Secretary to waive unconvicted gang members from inadmissibility if it is determined that the alien has renounced any association with the gang and is not a threat to the security of the United States.

Section 3702 renders habitual drunk drivers inadmissible and deportable if the convicted of three drunken driving offenses on separate dates. In deportation cases, at least one of the convictions must occur post-enactment. This section also includes a third drunk driving conviction as an "aggravated felony" under Section 101(a)(43)(F) of the INA.

Section 3703 modifies the definition of the term "aggravated felony" to include almost all crimes of a sexual nature involving a minor, allowing the victim's age to be proven by extrinsic evidence.

Section 3704 modifies the INA's illegal entry provision by providing higher maximum penalties for aliens convicted of illegal entry who have a sufficiently serious criminal record. This section provides for increased civil penalties for any alien over age 18 who is apprehended illegally entering or attempting to enter the United States. The Judiciary Committee's minority report notes that this section "removes 'attempting to enter the United States' as a crime."

Section 3705 provides higher maximum penalties for aliens convicted of illegal reentry (8 U.S.C. §1326) who have a sufficiently serious criminal record. This section also:

- Adds an element to an affirmative defense;
- Creates a new affirmative defense for persons who were minors at the time of their first entry and who have not been convicted of a felony-level crime;
- Provides that an alien who illegally reenters must generally serve the remainder of any criminal sentence pending against him at the time of deportation, with no reduction for parole or supervised release; and
- Contains an exception from aiding and abetting crimes for legitimate emergency humanitarian assistance.

Section 3707 amends the criminal code and expands penalties pertaining to passport, visa, and document-related fraud.

Section 3709 renders inadmissible and removable any alien convicted of a passport or visa violations.

Section 3711 expands the grounds for inadmissibility to include crimes involving domestic violence, stalking, and child abuse, along with violations of protection orders. Under this section, withholding information for biometric screening also would be made a ground for inadmissibility.

Section 3712 creates new felony offenses relating to the commercial smuggling of five or more people, imposes criminal penalties for hindering or obstructing alien apprehensions, and imposes enhanced penalties for use of a firearm in an alien smuggling offense.

Title IV – Reforms to Nonimmigrant Worker Programs to Promote Economic Growth and Protect American Workers

Section 4101 creates a new cap on H-1B visas of 115,000 for the first fiscal year beginning after the date of enactment. Based on a demand-driven formula as an escalator, the cap can be increased in subsequent years with 115,000 visas as the floor and 180,000 as the ceiling.

Under this section, the exemption for graduates with advanced degrees in Science, Technology, Engineering and Math (STEM) is increased from 20,000 to 25,000.

Section 4104 establishes a new $1,000 fee to be submitted with permanent labor certification applications.

Section 4211 revises the computation of prevailing wage levels. This section states that the wages of H-2B nonimmigrant workers is not to exceed the actual wage paid by the employer to other employees with similar experience and qualifications. Alternatively, the wage also shall not exceed the prevailing wage level for the occupational classification of the job in the geographic area of the employment.

Section 4214 expands the authority of the Department of Labor to review labor condition applications (LCAs) for fraud or misrepresentations.

Section 4507 allows for the expansion of registered traveler programs to include people employed by international organizations that maintain a strong working relationship with the United States. It would require that the individual traveler:

- Be sponsored by a qualified organization;
- Complete security screening requirements;
- Not be a citizen of a state sponsor of terrorism;
- Have a passport from a country with a Trusted Traveler Arrangement with DHS.

Section 4508 directs the Secretary of State to set a goal for U.S. consulates worldwide of interviewing 80 percent of all nonimmigrant visa applicants within three weeks of receipt of application, and to expand resources in China and Brazil to keep visa appointment wait times under 15 days.

Section 4601 expands the definition of "returning worker" who is not subject to the H-2B quota to include any worker who has been an H-2B nonimmigrant during any one of the three fiscal years immediately preceding the fiscal year of the approved start date of a petition for that worker.

Section 4602 requires H-2B employers to attest that they will not displace a United States worker in the same metropolitan statistical area where the H-2B worker will be hired within the period beginning 90 days before the start date and ending on the end date of the H-2B employment.

Section 4701 establishes an independent statistical agency called the Bureau of Immigration and Labor Market Research within U.S. Citizenship and Immigration Services at DHS. The commissioner of this bureau shall be appointed by the President, with the advice and consent of the Senate.

Under this section, this bureau would be responsible for, among other things:

- Making recommendations about employment-based visa programs;
- Determining methodologies for the index used to calculate numerical limits in the W-1 program;
- Calculating changes to these numerical limits;
- Designating certain "shortage occupations" for exemption from the limits.

Sections 4702 and 4703 create the new W-1 and W-2 Guest Worker visa categories for non-agricultural workers and families. The W visa holder is an alien having a foreign residence who will come to the U.S. temporarily to perform services or labor for a registered employer in a registered position. The spouse and minor children of the W visa holder will be allowed to accompany or follow to join and will be given work authorization for the same period of admission as the principal W nonimmigrant is allowed.

Section 4801 creates a new, three-year nonimmigrant visa for people who are able to secure at least $100,000 in investments from an accredited investor, venture capitalist or government entity. Alternatively, a person can obtain a nonimmigrant visa if he or she has a U.S. business that has created at least three jobs and has generated at least $250,000 in annual revenue for the previous two years.

Section 4802 creates a new "EB-6" immigrant visa category for up to 10,000 entrepreneurs per year. In order to qualify for this visa, an entrepreneur must have:

- Maintained nonimmigrant status for at least two years;
- Created at least five jobs in the United States;
- Secured at least $500,000 investment or generated at least $750,000 in annual revenue during the last two years.

In order to qualify, entrepreneurs with an advanced degree in STEM must have:

- Maintained nonimmigrant status for at least two years;
- Created at least five jobs in the United States;
- Secured $500,000 in investments.

Administration Position

The Obama Administration supports this legislation.

Cost

The Congressional Budget Office has yet to score S. 744. Sponsors note that the costs of administering the bill will be funded by application fees and fines imposed by the legislation. Key appropriations of this legislation include:

- $2 billion to implement the Southern Border Security Strategy;
- $1.5 billion to implement the Southern Border Fencing Strategy;
- $2 billion to fund the Southern Border Security Commission;
- $1.8 billion to fund start-up and expansion of employment verification systems, Exit System, and various visa programs.

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